

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
JAMES A KAY, JR. ) WT Docket No. 94-147  
 )  
Licensee of One Hundred Fifth- )  
two Part 90 Licenses in the Los )  
Angeles, California Area. )

To: Honorable Richard L. Sippel

**PETITION FOR LEAVE TO FILE APPEAL**

James A. Kay, Jr. ("Kay"), by his attorneys and pursuant to Section 1.301(b) of the Commission's Rules, hereby petitions for leave to appeal the Presiding Judge's Order, FCC 98M-15, released February 2, 1998 (the "Order"). In support thereof, Kay states as follows:

1. Section 1.301(b) provides a basis on which to take an interlocutory appeal, with the Presiding Judge's concurrence, where there is a "new or novel" question of law or policy and the ruling is such that remand would be likely to occur if the appeal is deferred and raised as an exception. Based on the Order, Kay submits that the action of the Presiding Judge, in relying on an Initial Decision (Marc Sobel, et al., FCC 97D-13, released November 28, 1997) ("Sobel ID") presently on appeal, as the basis upon which a hearing issue is to be added and for fact preclusion purposes, exceeds the bounds of the authority delegated to the Presiding Judge and will constitute reversible error resulting in a future remand of the proceeding. Hence, there is a substantial basis for consideration of an interlocutory appeal in this matter.

2. The question for the Commission is whether the Presiding Judge was entitled to rely on the Sobel ID as not only the substantive basis for a hearing issue but also to restrict the

ability of Kay to litigate the issue the issue of whether Kay participated in an unauthorized transfer of control. The Presiding Judge's decision must be considered by the Commission in light of principle of collateral estoppel (issue preclusion) as that has been interpreted by the Commission. See Imagists, 66 RR 2d 928 (Rev. Bd. 1989).

3. Turning first to the question of whether an ALJ's decision applies, Kay submits that this is not the case. The Sobel ID is subject to exceptions filed by both Sobel and Kay. Section 1.276(d) of the Commission's Rules mandates that an initial decision is not effective, and is, in fact, stayed of effectiveness until the Commission's review of the initial decision has been completed. This is very clear and specific language and prohibits the application of the initial decision until review has been undertaken and completed. Action to the contrary should not be taken by the Presiding Judge.

4. The Presiding Judge has relied on decisions rendered in Stereo Broadcasters, Inc., 74 FCC 2d (1979), aff'd, 652 F. 2d 1026, 1030 (D.C. Cir. 1981), and Ocean Pines FM Partnership, 4 FCC Rcd 3490 (Rev. Bd. 1989). In both of these cases, an issue was added to a proceeding based on initial decision in another proceeding. However, the precedent established in these cases is not one that is applicable to the instant proceeding.

5. In both Stereo Broadcasters and Ocean Pines, the conduct of the actual party in one proceeding, who was also a party in another proceeding, was permitted to be the subject of a hearing issue. The fact that it was the same party who had been disqualified and was an applicant in another case is the significant point. The Review Board made just this point in Ocean Pines, when it reasoned, in a critical footnote (4 FCC Rcd at 3492 n. 6):

In Imagists, the Board noted that the ALJ, the Board, and the full Commission had determined that a key principal in a Conroe, Texas applicant to have misrepresented her role in the Conroe application, in a contemporary case. We therefore requested the parties to brief the questions of whether the doctrine of collateral estoppel obtained. In the instant case, however, the adverse conclusions regarding Dr. Berger's role in the Fenwick Island proceeding are before the Board on exceptions to that Initial Decision, and are currently sub judice.

See also, Imagists, supra, 66 RR 2d at 931-932.

6. It is obvious then that the issue before the Commission is one of issue preclusion and not application of the Ocean Pines precedent. Considering that, the Commission must answer the question of whether issue preclusion applies. As Imagists instructs, issue preclusion involves the application of four essential elements. These are:

1. Are the issues identical to those previously litigated and which were essential to the previous decision.
2. Has the prior adjudication reached a final judgment on the merits.
3. Was the party to be estopped a party to the prior litigation.
4. Did the estopped party have a full and fair opportunity to litigate the issue in the prior proceeding.

7. The answer to each of these four inquiries is clearly no and, as the Board found in Imagists, there is no basis on which to apply issue preclusion. Taking each of these elements seriatim, it is obvious that the Commission must reverse the Presiding Judge. First, the issues designated in this matter are not the same as designated in the Sobel ID. The issue in the Sobel ID involved whether Sobel had engaged in an unauthorized transfer of control. Sobel and Kay are different individuals and there was no issue involving Kay's actions before the Presiding Judge. Just as in Imagists, where the parties are different, issue preclusion does not apply.

8. The second element involves no dispute. The Sobel ID has not been litigated through the Commission. In Imagists, the Review Board noted (66 RR 2d at 929 n.1) that all administrative review had been completed. This element points against issue preclusion.

9. The third element raises the question of whether the party to be estopped was a party to the prior litigation. Kay was merely an intervenor. The party in the prior litigation was Sobel, not Kay. Thus, Kay had no basis to deal with any matter involving himself. The entire case involved the role of Sobel. Hence, this element also cuts against issue preclusion.

10. Finally, the element of “full and fair opportunity to litigate” the issue. There was no basis to litigate the role of Kay in the Sobel ID. On the contrary, that was a proceeding involving the actions of Sobel. There was no chance to litigate any issues involving Kay as they were neither designed nor relevant to the Sobel proceeding. Again, this element mandates the inapplicability of issue preclusion.

11. Considering this, the Commission must be called upon to resolve the principle of issue preclusion. In this case, the Commission must resolve the four elements as they apply to the instant matter. Kay submits that the Commission’s review is necessary because the Presiding Judge has ignored the question of the applicability of an initial decision to another proceeding and, more importantly, the principle of issue preclusion where the four elements are not applicable.

12. In Imagists, the Review Board rested its ultimate findings on the important point of a party being able to litigate matters affecting it “in a forum that affords her all due process rights.” Imagists, *supra*, 66 RR 2d at 932. This is the point that the Commission must be asked to rule upon in this case, whether Kay’s due process rights are denied when a Presiding Judge

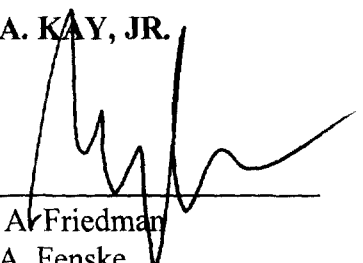
prohibits the party from being able to litigate whether it has participated in a claimed unauthorized transfer of control. Applying Imagists, the Commission will have no trouble in finding such an entitlement.

13. Imagists teaches that the results of one administrative hearing are not to be applied to another with reckless abandon. Unless the matter involves an individual who is the party before the Commission in both proceedings, the four elements of issue preclusion must be applied. These standards mandate that unless a party has a full and fair hearing on issues involving it, there will be no issue preclusion. In this case, Kay has never been the subject of any hearing dealing with his actions in regard to the control of Sobel's stations. In fact, the question is not one of unauthorized transfer of control, but one of unauthorized assumption of control. Application of the four elements of issue preclusion mandate that due process has not been given Kay and the decision in the Sobel ID cannot be applied against him, "without infringing upon [his] fundamental due process rights." Imagists, supra, 66 RR 2d at 928.

WHEREFORE, it is respectfully requested that the Presiding Judge permit an appeal to the Commission dealing with the application of Section 1.276(d) and the principle of collateral estoppel (issue preclusion) to this case.

Respectfully submitted,

**JAMES A. KAY, JR.**

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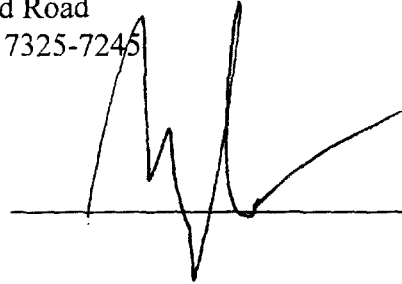
**CERTIFICATE OF SERVICE**

I, Barry A. Friedman, do hereby certify that I have, on this 9<sup>th</sup> day of February, 1998, served a copy of the foregoing "Motion for Leave to File Appeal," upon the following parties by first-class mail, postage prepaid:

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A handwritten signature in black ink, appearing to be "W. Knowles-Kellett", written over a horizontal line.